

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARY RUSHING, as the
Administrator and on Behalf of the
Estate of ROBERT COON, and
MARY RUSHING, individually,

Plaintiffs,

v.

FRANKLIN HILLS HEALTH
& REHABILITATION CENTER,

Defendants.

NO. CV-11-0471-LRS

**ORDER GRANTING PLAINTIFFS'
MOTION TO AMEND & REMAND**

BEFORE THE COURT is the following motion: Plaintiffs' Motion To Amend and To Remand (ECF No. 4), filed on January 18, 2012 and noted without oral argument.

A. Plaintiffs' Motion to Amend/Remand

This civil tort action was commenced against a nursing home doing business in Spokane currently identified as Franklin Hills Health & Rehabilitation Center (Franklin Hills) in Spokane County Superior Court (Cause Number 11-2-04875-1) filed on November 11, 2011. The Summons and Complaint were served on Linda Evans, Administrator for Franklin Hills by personal service on December 12, 2011. Defendant filed an Answer. A Notice of Removal from state court to this Court was served on plaintiffs' counsel on December 23, 2011, based on alleged diversity of citizenship. As part of plaintiffs' motion for remand, plaintiffs are also seeking

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1 to amend the complaint to add three additional defendant nurses, all residents of
2 Washington according to the proposed Amended Complaint for Damages. (ECF
3 No. 4-3).

4 Plaintiffs seek leave to amend their complaint in order to add non-diverse
5 defendants and employees of Franklin Hills, Melissa Chartrey, R.N., Surilla Pool,
6 R.N., and the Director of Nursing, as it is their alleged conduct that form the basis
7 for liability in this case. Plaintiffs rely on Fed.R.Civ.P. Rules 15 and 20. Plaintiffs
8 additionally explain 28 U.S.C. §1447(e) provides that if, after a case is removed,
9 a plaintiff seeks to join non-diverse defendants whose joinder would destroy
10 diversity, the district court may permit or deny, in its discretion, joinder. If joinder
11 is permitted, diversity jurisdiction no longer exists and in the absence of some other
12 basis for subject matter jurisdiction, the court must then remand the case back to
13 state court.

14 Plaintiffs also argue that other than stating that Franklin Hills is a wholly
15 owned subsidiary of Extendicare, defendant Franklin Hills has offered no proof
16 that its “nerve center” is its Delaware headquarters for Extendicare. Plaintiffs
17 maintain that utilizing the “nerve center” tests set forth in *Hertz Corp. v. Friend*,
18 130 S.Ct. 1181 (2010), the direction, control and coordination of the health care of
19 residents at Franklin Hills occurs locally and daily by the Director of Nursing and
20 other treatment providers. Plaintiffs conclude, Franklin Hills is a non-diverse
21 citizen which also requires remand back to state court.

22 Defendant responds that the proposed amendment of the complaint to add
23 non-diverse, individual nursing staff at Franklin Hills is an attempt to destroy
24 diversity in this litigation and the motion should be denied. Defendant further
25 argues that Franklin Hills is the registered trade name of a foreign corporation,
26 whose principal place of business is in Wisconsin, which establishes diversity
27 jurisdiction. Moreover, plaintiffs' proposed amendment includes non-necessary
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1 parties for whom the defendant is vicariously liable, and who are unnecessary to
2 resolution of plaintiffs' claims.

3 Plaintiffs reply that Fed. R. Civ. P. 15(a) allows for liberal amendment of
4 pleadings and contrary to what defendant argues, the Affidavit of Dylan Mann
5 (Vice President and Controller for Extendicare Homes) is not sufficient to establish
6 corporate citizenship pursuant to *Hertz*. The *Hertz* court rejected a comparable
7 declaration finding the document to be self serving requiring remand for further
8 fact finding. Moreover, plaintiffs reply, even if Extendicare's corporate
9 headquarters in Milwaukee govern board activities and administrative functions,
10 the Mann Affidavit fails to provide any information establishing that the corporate
11 office is involved in day to day supervision, oversight or decision-making
12 involving nurses providing patient care and services to Spokane nursing home
13 residents. ECF No. 8. Plaintiffs conclude that at the very least, further fact-finding
14 is necessary on this issue of defendant's corporate citizenship.

15 Plaintiffs further assert in reply that the case *Roble v. Roundup Corp.*, 148
16 Wn.2d 35, 52-53, 59 P.3d 611 (2002) relied upon by defendant to establish that the
17 employers underlying tort will render the employer vicariously liable, is only
18 applicable if the employee was acting within the scope of his or her employment.
19 Because discovery has not yet started, plaintiffs state there is no reasonable way
20 to determine what the evidence will show with respect to the conduct involved.
21 Should the evidence later show that the employees (sought to be added through
22 amendment) were not acting within the scope of their employment, the plaintiffs
23 would be significantly prejudiced.

24 B. Legal Standards

25 "Under the Federal Rules of Civil Procedure, leave to amend should be
26 freely granted when justice so requires." *M/V American Queen v. San Diego*
27 *Marine Constr. Corp.*, 708 F.2d 1483, 1492 (9th Cir.1983). "This strong policy
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1 toward permitting the amendment of pleadings, however, must be tempered with
2 considerations of 'undue delay, bad faith or dilatory motive on the part of the
3 movant, repeated failure to cure deficiencies by amendments previously allowed,
4 undue prejudice to the opposing party by virtue of allowance of the amendment,
5 futility of amendment, etc.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230,
6 9 L.Ed.2d 222 (1962).

7 When a case is removed from state court, a district court must remand the
8 case if it determines that it lacks subject matter jurisdiction. See 28 U.S.C.
9 §1447(c). There is a "strong presumption" against removal, *Gaus v. Miles, Inc.*,
10 980 F.2d 564, 566 (9th Cir.1992), and any uncertainties are to be resolved in favor
11 of remand. See *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393 (9th
12 Cir.1988); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th
13 Cir.1985); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct.
14 868, 85 L.Ed. 1214 (1941). The burden of persuasion for establishing diversity
15 jurisdiction, of course, remains on the party asserting it. *Kokkonen v. Guardian*
16 *Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391
17 (1994).

18 The Court finds that at this stage in the proceedings, and finding no undue
19 delay, bad faith or dilatory motive on the part of the plaintiffs, justice requires that
20 leave to amend the complaint be given, allowing joinder of the non-diverse
21 employees of defendant Franklin Hills. Although defendant Franklin Hills argues
22 that the employees sought to be added in the Amended Complaint are not
23 indispensable, the Court finds it is too early at this juncture to determine their
24 conduct and liability.

25 The Court notes that there appears to be a bona fide dispute on the issue of
26 defendant's "nerve center" for determination of corporate citizenship, rendering the
27 propriety of the removal in the first instance questionable. However, with the
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1 filing of the Amended Complaint, diversity is lost. The Amended Complaint
2 alleges violation of Washington's Vulnerable Adult Statute and there are no federal
3 statutes at issue in the Amended Complaint. Therefore, the Court remands this
4 case to Spokane County Superior Court. Accordingly,

5 **IT IS HEREBY, ORDERED, ADJUDGED AND DECREED** that
6 Plaintiffs' Motion To Amend and To Remand (ECF No. 4) is **GRANTED**.
7 Plaintiffs are directed to file their Amended Complaint and the above-entitled
8 action is **REMANDED** to the Superior Court of Spokane County, Washington.

9 **IT IS SO ORDERED.** The District Executive is directed to enter this order,
10 forward copies to counsel, and **CLOSE FILE**.

11 **DATED** this 8th day of March, 2012.

12 *s/Lonny R. Suko*

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14 LONNY R. SUKO
15 United States District Judge
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